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In The

# Supreme Court of the United States

October Term, 1997

JOSEPH PANKHURST,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED FOR REVIEW

Did the United States Court of Appeals exceed its limited appellate authority under Federal Rule of Criminal Procedure 52(b) by vacating a sentence without conducting a plain error analysis, when the error was forfeited for failure of the government to object at trial to lack of notice of a possible downward departure?

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## PETITION FOR WRIT OF CERTIORARI

The Petitioner, Joseph Pankhurst, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on July 21, 1997. The lower court denied the Petition for Rehearing on August 20, 1997.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit that gives rise to this petition, *United States v. Pankhurst*, 118 F.3d 345 (5th Cir.), *reh'g denied* (Aug. 20, 1997), is reprinted as Appendix A.

## JURISDICTION

The judgment was entered below on July 21, 1997. A Petition for Rehearing was denied on August 20, 1997 (see Appendices B and C). Under 28 U.S.C. § 1254(1), this Honorable Court has jurisdiction in this case and the Petitioner may seek review of the decision of the United States Court of Appeals for the Fifth Circuit, which vacated his probated sentence and remanded for re-sentencing.

## STATUTE INVOLVED IN THE CASE

Federal Rule of Criminal Procedure 52(b):

> **(b) Plain Error.** Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

## STATEMENT OF THE CASE

### A. Basis for Federal Jurisdiction in the First Instance.

The Petitioner was charged with one count of bribery of a public official under 18 U.S.C. § 201(b)(1).

### B. General Overview of the Case.

This case deals with a sentencing issue on a government appeal. The court below vacated a probated sentence because the trial court did not give the government notice that it was considering a downward departure. The Petitioner asserts that there was no government objection to lack of notice and this fact required the Court of Appeals to conduct a plain error analysis, which it did not do.

The trial judge stated at the sentencing hearing his belief that the nature of the offense itself was a mitigating circumstance not adequately considered by the sentencing commission. The trial court stated, "[a]nd I am slowly becoming convinced that because of the facts in this case, it is not something that I can find in the guidelines. I am

having a real struggle with it." (Tr. May 31, 1996 – 22, attached here as Appendix D.)[1]

The Petitioner submitted to the court, at this point, a basis for downward departure premised upon the trial court's earlier statement. "I think this is a proper case for a departure because the guidelines has (sic) not taken into consideration adequately the circumstances of this case, and under the catch all provision of the guidelines and the Code. . . . " (Tr. May 31, 1996 – 25). The attorney for the government stated, "Judge, the government would object to a downward departure. He specifically said that the basis for his downward departure was because the Government had basically intentionally ruined his client's ability to do business. . . . " (Tr. May 31, 1996 – 25).

After hearing the attorneys' arguments the trial court departed downward from the sentencing guidelines. The trial court made the following findings of fact:

> And pursuant to those provisions [18 United States Code, § 3553 and § 5K2.0], I find that there exists (sic) mitigating circumstances of a kind and a degree not adequately taken into consideration by the Sentencing Commission in formulating the guidelines, and therefore the sentence should be different from that provided in the guidelines. Specifically, the difference, the increase over the ten level.

---

[1] The transcript of sentencing is contained in one volume by date. This transcript will be referred to as "Tr. May 31, 1996 – page number."

> I think the facts in this case are so peculiar and in such a strange state that the guidelines do not apply adequately in that increase. Therefore I am going to sentence him at the level 10.

(Tr. May 31, 1996 – 30).

After the sentence was imposed, the government made the following objection: "The Government needs to object on the record to the sentence that has been imposed. I just want to state for the record, we disagree with the Court's basis for downward departure and reserve the right and will be filing a notice of appeal." (Tr. May 31, 1996 – 31).[2]

**C. Facts Pertinent to the Question Presented.**

The Petitioner appealed his conviction and the government cross-appealed the sentence, arguing that the trial court erred in departing downward without giving the government notice of a possible downward departure. The Petitioner urged to the United States Court of Appeals for the Fifth Circuit that the government failed to object at trial on the grounds of lack of notice. Therefore, that Court should have reviewed the district court's actions under the rigorous standard of plain error review.

---

[2] The only other objection made by the prosecutor at sentencing other than the general objection discussed above was an objection to the court's failure to apply a "16-level (sic) increase as stated in the presentence report." (Tr. May 31, 1996 – 32). The Presentence Report recommended a 14-level increase. (*See* Document No. 146 ¶ 24).

The Court of Appeals held that "the objection [to the basis for departure], alerted the court, as well as [the Petitioner], that the Government had not received notice of this new departure-basis, later used by the court." *United States v. Pankhurst, supra,* at 356. The Court also stated:

> The objection to the basis seized by [the Petitioner] and ultimately used by the court certainly alerted the court that the sentencing hearing had moved to new territory for which the Government had not been given notice. As the court moved to this new territory off and on during the hearing, both before and after the Government objected to the new departure-basis when [the Petitioner] seized upon it, the Government should have better articulated its lack-of-notice objection, on the assumption that the sentencing court seemed inclined increasingly to use that basis.
>
> But, surely, the court was aware when it ruled that it was utilizing a departure-basis sua sponte, without having given notice; and that, because of a lack of notice from both the court and [the Petitioner], the Government had not had an opportunity to comment consistent with Rule 32. Part of the court's awareness had to come from the Government's earlier objection when [the Petitioner] urged this same – new – basis. On this record, the lack-of-notice objection was sufficient.

*Id.* at 356-57. Holding that the government's objection was sufficient, the Court of Appeals did not use a plain error analysis in reviewing the district court's actions.

## REASONS FOR GRANTING THE WRIT

### I.

### THE COURT OF APPEALS ERRED BY EXCEEDING ITS LIMITED APPELLATE AUTHORITY UNDER FEDERAL RULE OF CRIMINAL PROCEDURE 52(B) BY VACATING A SENTENCE WITHOUT CONDUCTING A PLAIN ERROR ANALYSIS WHEN THE ERROR WAS FORFEITED FOR FAILURE OF THE GOVERNMENT TO OBJECT AT TRIAL TO LACK OF NOTICE OF A POSSIBLE DOWNWARD DEPARTURE.

**A. The Court Should Grant This Writ Because The Court Of Appeals For The Fifth Circuit Has Rendered A Decision In Conflict With Controlling Precedent Of The Supreme Court Of The United States, To Wit: *United States v. Olano*, 507 U.S. 725, 113 S. Ct. 1770, 123 L.Ed.2d 508 (1993) And *Johnson v. United States*, ___ U.S. ___, 117 S. Ct. 1544, 137 L.Ed.2d 718 (1997).**

The case at bar conflicts with the settled holdings of the Supreme Court of the United States. In this case the government did not make a specific objection to the district court stating lack of notice as the ground for its objection. As a result, this objection was forfeited and the Court of Appeals should have used a plain error analysis to determine whether the sentence should be vacated.

**1. The Court of Appeals erred in finding that the government's objection was sufficient to preserve the issue for review; the objection made at trial was not specific in that it was not based on lack of notice, so any error was forfeited.**

"No procedural principle is more familiar to [the Supreme] Court than that a constitutional right, or a right of any other sort, may be forfeited in criminal as well as civil cases by the failure to make a timely assertion of the right before a tribunal having jurisdiction to determine it." *United States v. Olano*, 507 U.S. 725, 113 S. Ct. 1770, 1776, 123 L.Ed.2d 508 (1993), *quoting Yakus v. United States*, 321 U.S. 414, 444, 64 S. Ct. 660, 677, 88 L.Ed. 834 (1944) (internal quotes omitted). This rule was followed even before the *Olano* decision was rendered. The Court of Appeals for the Eighth Circuit, in a case involving a government appeal of a sentence, noted that:

> *The government could have articulated a clear objection at any point during these proceedings and preserved this argument for appeal. The government did not do so, and thus, arguments raised for the first time on appeal shall not be considered.*

*United States v. Houston*, 892 F.2d 696, 707 (8th Cir. 1989) (citations omitted) (emphasis added).

**2. Since the error was forfeited, the appellate authority of the Court of Appeals was limited, and the Court should have used a plain error analysis.**

The courts of appeals have "a limited power to correct errors that were forfeited because not timely raised in district court." *United States v. Olano, supra*, 113 S. Ct. at

1776. Reversal can occur only for plain error that meets the test of Rule 52(b) of the Federal Rules of Criminal Procedure. *Id.* at 1776-77.

In the case at bar the government did not object to "lack of notice" at the sentencing hearing. The Court of Appeals reviewed the district court's decision de novo anyway. This is clearly in conflict with Supreme Court precedent and exceeded the Court's authority under Federal Rule of Criminal Procedure 52(b). In the absence of a clear objection stating as its grounds "lack of notice," the Court of Appeals should have used a plain error analysis under *United States v. Olano, supra.*

The most recent pronouncement of this Honorable Court on the subject of forfeited trial error was in *Johnson v. United States,* ___ U.S. ___, 117 S. Ct. 1544, 1547, 137 L.Ed.2d 718 (1997).

The Supreme Court of the United States affirmed the ruling of the Court of Appeals for the Eleventh Circuit, which applied a plain error analysis. "Under [the *Olano*] test, before an appellate court can correct an error not raised at trial, there must be (1) 'error,' (2) that is 'plain,' and (3) that 'affect[s] substantial rights.' " *Id.* 117 S. Ct. at 1548-49, *citing United States v. Olano, supra,* 113 S. Ct. at 1776. "If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error 'seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.' " *Id.* 117 S. Ct. at 1549, *citing United States v. Young,* 470 U.S. 1, 105 S. Ct. 1038, 1046, 84 L.Ed.2d 1 (1985). This Court affirmed the Court of Appeals judgment that while error occurred, "[n]o 'miscarriage of justice' will result here if

we do not notice the error." *Id.* at 1550, *citing United States v. Olano, supra,* 113 S. Ct. at 1779.

The Court of Appeals in the case at bar did not use the *Olano* test in reviewing the trial court's decision. A plain error analysis should have been used in this case. The government failed to object to lack of notice at trial; since it did not, any objection based on lack of notice was forfeited. By reviewing the district court's decision de novo the Court of Appeals relieved the government of its burden on appeal, and exceeded its limited appellate power. This Honorable Court should grant the Petition for Writ of Certiorari to ensure that its precedent is followed.

**B. The Court Should Grant This Writ Because The Court Of Appeals For The Fifth Circuit Has Rendered A Decision In Conflict With The Decisions Of The United States Courts Of Appeals For The Sixth, Seventh, And First Circuits, To Wit: *United States v. Barajas-Nunez*, 91 F.3d 826 (6th Cir. 1996); *United States v. Otis*, 107 F.3d 487 (7th Cir. 1997); And *United States v. Mangone*, 105 F.3d 29 (1st Cir.), *Cert. Denied*, ___ U.S. ___, 117 S. Ct. 2424, 138 L.Ed.2d 187 (1997).**

The Court of Appeals in this case did not apply a plain error analysis to the procedural facts. Several other Courts of Appeals, however, have used plain error as the standard of review in these situations. The facts in *Barajas-Nunez* are similar to the case at bar, in that the district court departed downward without giving advance notice to the parties. *United States v. Barajas-Nunez,* 91 F.3d 826, 828 (6th Cir. 1996). At the sentencing

hearing, the defendant requested a downward departure. *Id.* at 828. The district court granted the departure. *Id.* at 829. The government did not object to lack of notice at the sentencing hearing. *Id.* at 830. However, the government appealed the sentence, arguing that the departure was improper because, *inter alia*, it did not receive advance notice. *Id.*

The Court of Appeals held that, "[g]enerally, a failure to object at sentencing forfeits any challenge to the sentence on appeal." *Id.* at 830, *citing United States v. Olano, supra*, 113 S. Ct. at 1776. Since the government failed to object when the defendant requested a downward departure, and also failed to object when the district court gave it an opportunity to comment after sentence was imposed, the objection was forfeited. *Id.* Therefore, the Court of Appeals reviewed the sentence for plain error pursuant to *United States v. Olano, supra. Id.*

In the case at bar, the government only objected to the *basis* for departure that the Petitioner's counsel made to the court. The government *never objected to lack of notice from the court* of possible departure. The only objection made was to the change in *the Petitioner's basis* for a downward departure. The government's failure to object at the sentencing hearing on the basis of "lack of notice" deprived the trial court of the opportunity to respond to the objection, to clarify the record, or to correct an error.

In a case before the Court of Appeals for the Seventh Circuit, the defendant argued that the court gave him insufficient notice of its intent to depart from the guidelines. *United States v. Otis*, 107 F.3d 487, 489 (7th Cir. 1997). The government argued that the defendant did not

object to the lack of notice and there was no plain error to justify a remand. *Id.* Although the defense counsel at trial complained about the departure, on appeal the defendant conceded to the lack of objection. However, the court stated, "[w]hether or not defendant properly preserved the issue is a moot point, because we find plain error." *Id.* Since a clear objection to lack of notice was not made at trial in the case at bar, the Court of Appeals for the Fifth Circuit should have conducted the required plain error analysis.

The Court of Appeals for the First Circuit remanded a case for re-sentencing where the district court departed upward without giving notice to the parties. *United States v. Mangone*, 105 F.3d 29, 35-36 (1st Cir.), *cert. denied*, ___ U.S. ___, 117 S. Ct. 2424, 138 L.Ed.2d 187 (1997). The defendant failed to object to the lack of notice at the sentencing hearing. *Id.* at 35. Therefore, the court reviewed the district court's actions under the "rigorous standard of plain error review." *Id.*

This Honorable Court should grant the Petition for Writ of Certiorari to resolve the conflict among the federal courts of appeals on this issue.

## CONCLUSION

The Court of Appeals for the Fifth Circuit did not follow *Olano* in the case at bar as did the courts in *Barajas-Nunez*, *Mangone*, and *Otis*. The procedural facts regarding failure of the government or the defendant to object on the basis of lack of notice of a departure are the same in these cases – the party complaining on appeal forfeited

an objection by failing to raise it before the district court, leading to the appellate court's application of plain error review. However, because of the decision of the Court of Appeals in the instant case, there is a conflict among the circuits on how the matter is to be handled on appeal consistent with the teaching of this Honorable Court in *United States v. Olano, supra.* Therefore this Honorable Court should grant the Petition for Writ of Certiorari because the Court of Appeals did not follow this Court's mandate in *Olano,* and to resolve the conflict among the circuits as to the proper procedure to use on appeal in such situations.

Respectfully submitted,

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# APPENDIX A

UNITED STATES OF AMERICA,
Plaintiff-Appellee/Cross-Appellant,

versus

JOSEPH PANKHURST,
Defendant-Appellant/Cross-Appellee.

No. 96-20563

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

118 F.3d 345; 1997 U.S. App. LEXIS 18199

July 21, 1997, Decided

SUBSEQUENT HISTORY: Rehearing Denied August 20, 1997, Reported at: 1997 U.S. App. LEXIS 26918.

PRIOR HISTORY: Appeals from the United States District Court for the Southern District of Texas. CR-H-93-277. Norman W. Black, Chief Judge.

DISPOSITION: AFFIRMED in PART; VACATED and REMANDED in PART.

COUNSEL: For UNITED STATES OF AMERICA, Plaintiff-Appellee-Cross-Appellant: Paula Camille Offenhauser, Assistant U.S. Attorney, Alice Ann Burns, Asst. U.S. Atty., Richard C. Smith, U.S. Attorney's Office, Houston, TX.

For JOSEPH PANKHURST, Defendant-Appellant-Cross-Appellee: Terri Raye Zimmermann Jacobs, Zimmermann & Lavine, Houston, TX. Jack B. Zimmermann, Zimmermann & Lavine, Houston, TX.

JUDGES: Before SMITH, BARKSDALE, and BENAVIDES, Circuit Judges.

OPINION BY: RHESA HAWKINS BARKSDALE.

OPINION: [*346] RHESA HAWKINS BARKSDALE, Circuit Judge:

The principal issue at hand is whether, prior to a sua sponte downward departure, the district court must give Fed. R. Crim. P. 32 pre-sentencing notice to the Government. Joseph Pankhurst appeals his conviction under 18 U.S.C. § 201(b)(1)(A) for "corruptly giving . . . [$10,000] to [a] public official . . . with . . . intent . . . to influence [an] official act"; he challenges both the jury instruction describing the "official act" ("acceptance of an offer by [Pankhurst] to purchase a loan being sold . . . by the Resolution Trust Corporation") and the sufficiency of the evidence, especially concerning his corrupt intent. The Government cross-appeals from the downward departure, in part because it [*347] was not given notice. We AFFIRM the conviction, but VACATE and REMAND for resentencing.

I.

Pankhurst and his wife owned Atlas Oil Company. In early 1992, Pankhurst, through Atlas Oil, acquired Jetera Fuels Terminaling Corporation for only $2,500. But, Jetera was burdened with a $5.6 million debt on two loans from TexasBanc Savings (TBS), with monthly payments of approximately $60,000 and with Jetera's property as security. TBS had failed prior to Atlas Oil's acquisition of Jetera; the TBS loans were managed by the Resolution

Trust Corporation (RTC), which, inter alia, had the power to foreclose on Jetera's property in event of default.

In mid-1992, although Jetera was not in default on either loan and was profitable, Pankhurst, as chairman of Jetera, requested that the RTC consolidate the loans and reduce the principal to $1.75 million. The RTC responded that the loans had been grouped with others for sale, and that their terms could not be negotiated then. Later that year, Jetera defaulted on the loans.

In response to the default, the RTC advised Pankhurst that it would order an appraisal and environmental assessment of Jetera. Pankhurst, again on behalf of Jetera, again requested loan consolidation and reduction.

In June 1993, Pankhurst, now on behalf of Atlas Oil Company, offered to the RTC to purchase for $500,000 either the Jetera property or the Jetera loans. In response, Ronnie Hooks, a contract employee for the RTC who was acting as senior asset manager for TBS, met with Pankhurst at the RTC's offices in Houston, Texas.

Hooks advised Pankhurst at the meeting that the RTC had received competing offers for the property securing the loans; that Jetera's appraised value was approximately $800,000; that the RTC was receiving approximately 70% of the appraised value for similar properties; and that, therefore, if Pankhurst increased his offer from $500,000 to $560,000, it might be accepted. Pankhurst increased his offer accordingly. And, later in the discussions, Pankhurst placed a stack of cash on the table. At this meeting, Hooks informed Pankhurst that he did not have the authority to accept Pankhurst's $560,000

offer to the RTC; in addition, he neither accepted nor rejected Pankhurst's offer of cash.

Concerning the cash placed on the table, Pankhurst testified that he had asked if an attorney would be necessary, and whether Hooks knew anyone willing to act as a consultant during the negotiations with the RTC; that he stated to Hooks that he had seen advertisements about former RTC employees offering to work as consultants; that he opened his briefcase in order to show Hooks such an advertisement, stating that he had seen about "ten of these"; and that some cash also happened to be in the briefcase, because he was about to make a deposit and, therefore, a deposit slip was bound to the top of the cash. On the other hand, Hooks testified that he understood the "ten of these" comment to be a reference to ten similar piles of cash.

Hooks reported Pankhurst's actions concerning the cash to the RTC. An investigation ensued, with Hooks assisting the FBI. In recorded telephone conversations, Hooks and Pankhurst discussed different documents Pankhurst would have to submit to the RTC, and the amount of Hooks' "consulting fee", which they set at $10,000.

During these recorded conversations, Hooks told Pankhurst that he did not want to meet at obvious places. They met at a hotel; Pankhurst then took Hooks to Pankhurst's car.

At the car, Hooks, wearing a recording device, stated that he had more work to do to get Pankhurst the deal he wanted from the RTC; that he had been afraid when Pankhurst first approached him about the deal in the RTC

offices; and that, within a few days, he could obtain acceptance of Pankhurst's offer to the RTC.

At that point, Pankhurst said that he would pay Hooks half of the $10,000 then and the other half when his offer to the RTC was accepted. He handed Hooks a binder labeled "corporate records"; the binder contained [*348] cash. Pankhurst gave Hooks part of the cash and said he would keep the rest in the trunk of his automobile.

Hooks delivered to the FBI the binder received from Pankhurst. It contained $5,000 in cash.

At Hooks' request, the two men met two days later at the same hotel. Again, Hooks was wearing a recording device and they met in Pankhurst's car. Pankhurst handed Hooks a letter offering $560,000, a settlement document, and a $2,000 earnest money check. In turn, Hooks gave Pankhurst a letter accepting the offer, and explained that Atlas Oil would be the purchaser and that the transaction would probably close by the end of the month. When Hooks asked about job opportunities, Pankhurst suggested that Hooks work for him. Pankhurst also gave Hooks the second $5,000 in a brown manila envelope, telling him to "put this in your briefcase".

Pankhurst was arrested at the subsequent, videotaped meeting he was instructed to attend to close the transaction. He was convicted by a jury of bribery of a public official, a violation of 18 U.S.C. § 201(b)(1)(A). Pankhurst's motions, during and after trial, for judgment of acquittal were denied, as was his motion for new trial.

At sentencing, consistent with the recommendation in the Presentence Report, the Government urged a guidelines sentencing range of 51 to 63 months. Instead, the district court, without having given Rule 32 pre-sentencing notice of a possible downward departure, ruled that the guidelines did not apply adequately to Pankhurst's offense and ordered a downward departure. Because of the resulting low offense level, and the fact that Pankhurst was a first offender, probation was a sentencing option. Pankhurst was placed on probation for one year (with home confinement) and fined $50,000. The sentence was stayed pending appeal.

II.

Pankhurst challenges the description for the "official act" used in the jury charge and claims there was insufficient evidence for conviction, in part because of a claimed failure to prove corrupt intent. The Government challenges the downward departure, contending in part that it made a sufficient objection at sentencing about not being given notice of a possible departure.

A.

Pankhurst's one count indictment contained two possible grounds for conviction. He was charged with violating subparts (A) and (B) of 18 U.S.C. § 201(b)(1), which proscribes:

> directly or indirectly, corruptly giving, offering or promising anything of value to any public official . . . with intent . . .
>
> (A) to influence any official act; or

> (B) to influence such public official . . . to commit or aid in committing . . . any fraud . . . on the United States. . . .

18 U.S.C. § 201(b)(1). But, the court did not submit subpart (B) (fraud) to the jury as a possible basis for conviction. Accordingly, the only possible basis for conviction was an intent "to influence an official act" (subpart (A)), not an intent to effect a fraud on the United States (subpart (B)).

Accordingly, the court instructed the jury that it could return a guilty verdict only if it found, beyond a reasonable doubt, both that Pankhurst "directly or indirectly gave, offered or promised $10,000 to Ronald Hooks, a public official"; and that Pankhurst "did so corruptly [defined for the jury as 'done intentionally with an unlawful purpose'], with intent to influence an official act by a public official". The "official act" was defined as the act described in the indictment; therefore, the pertinent portion of the indictment was included then in the charge:

> Pankhurst, did directly and indirectly corruptly give, offer, and promise . . . $10,000 . . . to a public official, namely Ronald Hooks[,] . . . with the intent to influence an official act and to influence a public official, namely Ronald Hooks, to commit and aid in committing a fraud upon the United States. That is the acceptance of an offer by the defendant to purchase a loan being [*349] sold to the public by the Resolution Trust Corporation.[1]

---

[1] Concerning the difference in punctuation surrounding "that is" in the last sentence of the above-quoted transcribed charge and in the indictment, *see* note 2, *infra*.

The court's proposed charge had not contained a definition or description of the "official act" in issue. At the earlier charge conference, in his objections to that proposed charge, Pankhurst's counsel had contended, in a very general way, that the court should add such a definition or description. But, other than referring to the language in the indictment, Pankhurst's counsel did not offer a definition. And, when the court stated that the description in the indictment would constitute the definition for the "official act", Pankhurst's counsel did not object to the inclusion of the fraud language also contained there. Restated, he did not request that the fraud language be redacted. In fact, he agreed to the indictment, which included the fraud language, being used as the description or definition of the official act.

Now, however, on appeal with different counsel, Pankhurst asserts that the court committed reversible error in its "official act" instruction. Pankhurst complains that, instead of granting his "request[ ] . . . [to] instruct the jury specifically what they must find as the 'official act' ", the court used the indictment for that purpose. Likewise, he complains, most belatedly, that the indictment contained language concerning fraud as a possible aim of the payment to Hooks, making conviction on the fraud element possible, even though the court refused to submit that element to the jury. In the alternative, Pankhurst urges, again most belatedly, that, because the fraud language was left in, it should have been defined.

But, again, Pankhurst did not object to the inclusion of the fraud language, nor to the failure to define fraud, when the court opted to use the indictment to describe the official act. As noted, Pankhurst had, however,

requested earlier that the court define the official act. On the other hand, as also noted, he did not provide or suggest a definition, other than agreeing to the indictment's language being incorporated for that purpose.

Therefore, were Pankhurst challenging only the inclusion of the fraud language, we would, at most, review only for plain error. *E.g., United States v. Calverley*, 37 F.3d 160, 162-64 (5th Cir. 1994) (en banc). (In fact, as discussed *infra*, based on the colloquy at the charge conference, the issue presented is quite close to being invited error.)[2] However, [*350] because Pankhurst did object generally at the charge conference to the failure of the proposed charge to describe or define the official act, we

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[2] As for the inclusion of the fraud language, Pankhurst claims also that it caused confusion and deprived him of a fair trial. The indictment was provided to the jury for its deliberation. As indicated in note 1, *supra*, for the "official act" description, the punctuation used in the indictment is slightly different from that used in the transcript of that portion of the jury charge when the district court, in response to Pankhurst's request for a definition of the official act, verbally incorporated part of the indictment in defining the official act. The pertinent part of the indictment reads: "with the intent to influence an official act and to influence a public official, namely Ronald Hooks, to commit and aid in committing a fraud upon the United States, that is, the acceptance of an offer by the defendant to purchase a loan being sold to the public by the [RTC]." (Emphasis added.) As reflected in the portion of the charge quoted in the text, *supra*, the transcript of the charge, as read to the jury, uses a period, instead of a comma, between "upon the United States" and "that is" and does not have a comma after "that is". It reads in part: "with the intent to influence an official act and to influence a public official . . . to commit . . . a fraud upon the United States. That is the acceptance of an offer. . . . "

will, most dubitante, review, under our usual standard, the refusal to grant the requested instruction. (The detailed review that follows is also for the purpose of demonstrating further the total lack of merit in this issue.)

Of course, the court reporter was simply transcribing the trial judge's verbal inclusion of this part of the indictment. The version seen by the jury was in the indictment. We note this punctuation difference only as a hyper-technical partial response to Pankhurst's hyper-technical, semantic contention about jury confusion.

Pankhurst urges that the phrase "that is" caused confusion because the act described after "that is" (acceptance of Pankhurst's offer for the loan) might be understood to refer to the "influence fraud" portion of the charge, as opposed to the "influence an official act" portion; and that, as a result, both the indictment and charge were "vague and ambiguous", making it doubtful that the jury returned a unanimous verdict as to what the "official act" was and, therefore, deprived him of his right to a fair trial.

We disagree. First, the pertinent portions of the indictment and the charge are neither vague nor ambiguous. It is clear that, in each, the act described after "that is" refers to the official act as well as to fraud. And, in any event, Pankhurst did not present this objection at trial; again, even if there were an error, we would review only for plain error. Once again, new (appellate) counsel is raising a point that former (trial) counsel apparently felt, correctly, was not a source of error. In sum, there was no error.

Jury charges are reviewed only for an abuse of discretion; we determine "whether the court's charge, as a whole, is a correct statement of the law and whether it clearly instructs jurors as to the principles of law applicable to the factual issues confronting them." *United States v. McKinney*, 53 F.3d 664, 676 (5th Cir.), *cert. denied*, 133 L. Ed. 2d 184, 116 S. Ct. 261 (1995). If the trial court refuses a requested instruction, the requesting party must demonstrate that the proposal: (1) was a correct statement of the law; (2) was not substantially covered in the charge as a whole; and (3) concerned an important point in the trial such that failure to instruct the jury on the issue seriously impaired the defendant's ability to present a given defense. *United States v. Smithson*, 49 F.3d 138, 142 (5th Cir. 1995) *citing*, *United States v. Chaney*, 964 F.2d 437, 444 (5th Cir. 1992).

Obviously, with respect to the first part of the test, Pankhurst suffers greatly from his failure to submit to the district court a specific definition of the "official act". As provided for by Fed. R. Crim. P. 30, he should have submitted a written request; he did not even verbally offer a definition. Needless to say, without a specific proposal to review, we cannot say that the definition which Pankhurst may have wanted would have been legally correct. His failure to submit a definition to the court deprives us of the very subject of the requested appellate review. Pankhurst's mere (assumed) objection to the instruction is, in short, ineffective, and, most arguably, brings our review of this issue to a close.

But, in any event, the charge, as a whole, substantially covered Pankhurst's request. Even assuming that the incorporation of part of the indictment in the charge

possibly suggested fraud to the jury as a possible intended result of the charged bribe, fraud was not a permissible basis for conviction, because the court removed the fraud portion of the indictment from the jury's consideration. Again, the jury was charged only under subpart (A) (intent to influence official act).

As stated, in reviewing jury instructions, we look at the instructions as a whole. *McKinney*, 53 F.3d at 676. As given to the jury, the factual allegation underlying inducing fraud was exactly the same as that for influencing an official act: "That is the acceptance of an offer by [Pankhurst] to purchase a loan being sold to the public. . . . " This intent was the only one listed in the indictment and the only one argued by the Government. In the trial court's exercise of discretion, it determined that the intent element of § 201(b)(1)(A) was satisfied, under the facts of this case, if the jury found that Pankhurst had intended, through payment of $10,000 to Hooks, to influence the RTC to accept his offer.

While the jury charge may have also erroneously included a description of this intent as § 201(b)(1)(B) "fraud", that will not defeat the fact that such intent also satisfied the "official act" prong of § 201(b)(1)(A). *See* note 2, *supra*. The Government still had to prove, beyond a reasonable doubt, that Pankhurst intended to influence the RTC's acceptance of his offer. Therefore, the jury charge substantially covered Pankhurst's request, as that request would not have changed the burden on the Government or the possible defenses available to Pankhurst.

As noted, Pankhurst changed counsel after trial. Concerning this requested instruction issue, it is most enlightening that, in closing argument, Pankhurst's trial counsel pushed the fraud concept vigorously:

> They charged that Joe Pankhurst with intent corruptly gave $10,000 to Ronnie Hooks with the intent to influence an official act. And here is the official act: To commit and aid in committing a fraud upon the United States, that is the acceptance of an offer by the defendant to purchase [*351] a loan being sold to the public by the Resolution Trust Corporation.
>
> First place, it wasn't being sold to the public, it failed right there. But in the second place, he wasn't trying to get to perpetrate a fraud. He was trying to do a reasonable business deal . . .

(Emphasis added.) In short, Pankhurst combined fraud and influencing the official act. As discussed below, this was his apparent strategy. Moreover, as noted, the defenses available to Pankhurst were exactly the same as if the court had granted his request and had therefore defined or described the official act in some other way; Pankhurst still had to counter the Government's contention that he had intended, through a payment to Hooks, to influence the RTC's acceptance of his offer.

It bears repeating that Pankhurst agreed to the indictment's being included in place of some other definition of the "official act". As referenced earlier, we will not hold that agreement to constitute invited error, because Pankhurst had, at least, earlier requested a definition, even though the request was very general, if not vague, and even though he did not provide the desired language.

But, as also reflected in this record, Pankhurst's subsequent agreement to the indictment's being used as the definition, supplemented by his comments during the charge conference, as illuminated by responding comments by the trial judge, certainly cause the claimed error to border on invited error. This is demonstrated further by the fact that Pankhurst's post-verdict motions for judgment and for new trial urge, inter alia, that the jury had to find fraud, and that the evidence was insufficient on that point. In essence, what we are being presented with on appeal, in part, is appellate counsel's quite different view of the case from that of trial counsel. It goes without saying that points raised at trial are the points that control on appeal.

In sum, pursuant to our three-part review in regard to refusal of a requested instruction, there was no reversible error. In fact, as discussed ad nauseum, Pankhurst's appellate counsel have tried, in large part most improperly, to present a point of error where there was none. They have, for the most part, attempted to "rewrite history". They fail. The record is clear; what took place, took place. With the instructions, to which he agreed, Pankhurst's trial counsel was given, and permitted to do, exactly what he wanted, to argue exactly what he wanted to argue.

In responding to Pankhurst's contentions about the jury charge, the Government's brief points out what is immediately obvious from reviewing the charge conference and a few related documents. The Government notes, inter alia, that Pankhurst did not submit a proposed instruction prior to the conference; that the trial court "essentially granted Pankhurst's instruction

request"; that Pankhurst did not object to the included fraud language, limiting review to plain error on that point; and that, "[c]onceivably, Pankhurst 'invited' the error of which he now complains". Despite these serious, and correct, charges by the Government, Pankhurst does not have one word in response in his "Brief For the Cross-Appellee And Reply Brief For The Appellant". Instead, that brief deals only with the sentencing issue raised in the Government's cross-appeal.

This lack of response concerning an issue that, based on our exhaustive review, has no merit further fuels our concern about why this point was raised, and, especially, how it was presented/briefed. Pankhurst's appellate counsel have fallen far short of making a fair, much less accurate, presentation of the charge conference and related issues. They have presented an issue totally lacking in merit. Counsel are warned that such conduct in the future may result in sanctions being imposed against them.

B.

In district court, Pankhurst preserved our usual standard of review for his sufficiency issue by moving, at the close of the Government's case and at the close of the evidence, under Fed. R. Crim. P. 29(a), for a judgment of acquittal, contending, inter alia, that the evidence was insufficient to prove criminal intent beyond a reasonable doubt. *See United States v. Castaneda-Cantu*, 20 F.3d 1325, 1329-30 [*352] (5th Cir. 1994); *United States v. Knezek*, 964 F.2d 394, 399-400 & n.14 (5th Cir. 1992). (After the verdict, Pankhurst unsuccessfully moved for such judgment or

for new trial and, later, for reconsideration of the denial of that motion.) Therefore, the standard of review is whether the evidence, as viewed in the light most favorable to the verdict, would permit a rational trier of fact to find Pankhurst guilty beyond a reasonable doubt. *United States v. Jaramillo*, 42 F.3d 920, 922-23 (5th Cir.), *cert. denied*, ___ U.S. ___, 115 S. Ct. 2014 (1995); *Castaneda-Cantu*, 20 F.3d at 1330.

A conviction under 18 U.S.C. § 201(b)(1)(A) requires: (1) that Pankhurst directly, or indirectly, corruptly gave, offered or promised anything of value; (2) to any public official; (3) with intent to influence any official act. *United States v. Tomblin*, 46 F.3d 1369, 1376 (5th Cir. 1995). The evidence showed that Pankhurst negotiated with the RTC to purchase the Jetera loans; that, during these negotiations, he showed Hooks a stack of cash and said an acceptance of his offer would be worth ten of them; that, in surreptitious, but recorded, meetings, Pankhurst handed Hooks a "corporate records" binder which instead contained $5000 in cash, and then offered, and later delivered, the other half of the $10,000 when he received acceptance of his offer to the RTC; and that Pankhurst attempted to close his "deal" with the RTC.

In short, there was sufficient evidence that money was offered to Hooks, a public official, and that the goal was to influence the RTC's acceptance of Pankhurst's loan purchase offer, an official act. In addition, as both shown above and discussed further below, the evidence was more than sufficient regarding the requisite "corrupt" intent in offering the $10,000 to Hooks.

There was evidence that, without corrupt intent, Pankhurst was offering the $10,000 to Hooks as some type of "consulting fee" (as if that could be without such intent), and this view is supported by the fact that the loan-purchase offer Pankhurst made to the RTC could have been accepted by the RTC regardless of any influence on the part of Hooks. This is further corroborated by the fact that, at the sham closing, Pankhurst was careful that none of the documents contained any misstatements to the RTC. (Although this meeting was videotaped, Pankhurst's trial counsel failed, through claimed oversight, to offer the tape in evidence. Post-trial, it was submitted to the court by Pankhurst's trial counsel for consideration on sentencing.) Regardless of these facts, Pankhurst's claim fails for a number of reasons.

First, despite complaining of an apparent lack of integrity among the jury, Pankhurst does not contend there was juror misconduct or any external pressure on the jury to convict. He points to a pre-sentencing letter to the trial judge from the jury foreperson, which stated that " . . . we ha[d] no proof that Mr. Pankhurst intentionally walked into the Resolution Trust Corporation's office on the day in question and offered to bribe Mr. Hooks"; that the reason the jury decided to convict was because on Friday, when they were deadlocked at 9-3 to convict, they were told that, if they did not then reach a verdict, they would return on Monday, and, as a result, the three holdouts quickly changed their minds; and that, despite the professed lack of proof of intent, the jury voted to convict because Pankhurst was wealthy and had retained an expensive lawyer.

This does not rise to the level of noticeable juror misconduct. (At sentencing, the court advised counsel that the letter had been submitted; Pankhurst's lawyer had known of its probable submission and his inquiry about the letter prompted the court's reference to it. Despite suggesting that he might do so, Pankhurst did not seek to move for a new trial based on it. Reference to the letter, and the court's deferring action on it "until the matter arises", are included in the court's sentencing-ruling, quoted *infra*.) In any event, Pankhurst raises only sufficiency, not juror misconduct; the points made about the jury do not affect our sufficiency analysis. Restated, the objective sufficiency standard obviously does not include examination of jury deliberations or the jurors' true feelings; instead, we examine the evidence to determine whether it was sufficient for a rational jury to convict. *Jaramillo*, 42 F.3d at 922-23.

[*353] As discussed, the evidence was more than sufficient. For example, it included recordings of the two meetings in which Pankhurst gave the $10,000 – in $5,000 increments – to Hooks. These recordings include discussion about their first meeting, at the RTC office, during which Pankhurst placed the money on the table. As reflected by the recording of the second hotel/automobile meeting, Hooks stated: "But it scared me when you walked into the office and . . . laid that fee on the table and said, 'hey, . . . I need a consultant' or something. It scared me . . . and I had to give it some thought." Pankhurst replied: "Of course, . . . but who's got time to do the romance deal and the little tap dance; . . . here it is; and . . . that's the way I saw it."

Hooks testified that Pankhurst offered him $10,000 to act as "consultant" throughout the negotiation process. The manner of the transfer of the cash, at surreptitious meetings and hidden in a "corporate records" binder and in a plain brown manila envelope, point to Pankhurst's corrupt intent. Moreover, the fact that the second half of the payment to Hooks was not to be made until after Pankhurst received acceptance of his offer to the RTC points to the fact that this was not a consultant fee, but a quid pro quo for the RTC's acceptance of Pankhurst's offer.

This was a classic case for a jury. The competing evidence may seem convincing to some, but it presents merely an alternative to the decision a rational jury could reach. The contention that Pankhurst did not want to mislead the RTC in any of the closing documents, Pankhurst's testimony that he was attempting to hire Hooks as a "consultant" and that he thought this sort of transaction was legal and common, and the testimony about his good character, do not render the other evidence insufficient as a basis for conviction by a rational jury. Under these circumstances we cannot upset the verdict. E.g., *United States v. Pettigrew*, 77 F.3d 1500, 1518 (5th Cir. 1996)("The evidence need not exclude every reasonable hypothesis of innocence . . . and the jury is free to choose among reasonable constructions of the evidence.").

Finally, Pankhurst contends that the evidence was insufficient to prove that the loan he was attempting to purchase was in fact being sold to the public. The issue is meritless. The indictment charged that the official act which Pankhurst attempted to corruptly influence was the acceptance of his offer to purchase the loan. The

indictment states further, unnecessarily for purposes of § 201(b)(1)(A), that the loan had been offered for sale to the public. This description of the loan Pankhurst was trying to purchase was surplusage; even if the evidence did not support a finding that the loan was offered to the public, the statute was satisfied and the conviction must stand.

In the alternative, Pankhurst seeks a new trial. We review denials of such motions for abuse of discretion. E.g., *United States v. Giraldi*, 86 F.3d 1368, 1374 (5th Cir.1996). For the reasons given above, the district court did not abuse its discretion.

C.

The challenge to the district court's sua sponte downward departure is premised on both a lack of notice and the basis for the departure. In urging that the departure should be affirmed, Pankhurst counters, inter alia, that the Government failed to object to the departure – both to lack of notice and on the merits.

As hereinafter discussed, we conclude, based on our review of the record, that the Government's lack-of-notice objection was sufficient, even though it could – and should – have been far more specific. And, we conclude that, because the requisite Rule 32 notice of a possible downward departure was not given, we must remand for resentencing; therefore, we do not reach whether the departure would be upheld. For our analysis, a most detailed review of Pankhurst's sentencing process is required. Moreover, this detailed presentation highlights the extremely careful attention and painstaking analysis

given the merits of the sentencing issue/departure question by the district court.

The Presentence Report (PSR) recommended that Pankhurst's required base offense [*354] of 10 under U.S.S.G. § 2C1.1(a), for bribery of a public official, be increased, as required by § 2C1.1(b)(2) ("Specific Offense Characteristics"); a 14-level increase was recommended, on the basis that the requisite "benefit" to be received in return for the $10,000 payment was $5,053,000. (Pursuant to § 2C1.1(b)(2), because the "benefit" exceeded $2,000, reference was made to the table in § 2F1. ("Fraud or Deceit"); the offense level is to be increased by 14 if the loss exceeds $5 million.)

Because Pankhurst (a first offender) had a criminal history category of I, the guidelines sentencing range was 51-63 months. Pursuant to Rule 32(b)(4)(B), the PSR commented on possible sentencing adjustments; it recommended, inter alia, against a reduction for acceptance of responsibility, and, critical to the issue at hand, stated that the probation officer did not have any information concerning either the offense or Pankhurst which would justify a departure from the guidelines' sentencing range.

In his pre-sentencing filing in response to the PSR, Pankhurst stated that, in addition to prosecuting Pankhurst, the Government had sought to ruin him financially in the business world. That ruination has been extremely effective. This is a factor that has not been taken into consideration adequately by the Sentencing Commission and entitles [Pankhurst] to a downward departure.

The Government's pre-sentencing response objected to Pankhurst's downward departure demand, stating

with regard to the claimed attempt to "ruin" Pankhurst that, as with all convictions, there had been a press release.

At sentencing, in support of the PSR's recommendation that the benefit was in excess of $5 million, the Government urged that the loss was greater than that: simply put, Pankhurst had offered $560,000 for the loans to Jetera, for which slightly more than $5.6 million was owed, and which were secured by the Jetera property; deducting that $560,000 from the approximate $5.6 million owed left a benefit in excess of $5 million.

As he had in his objections to the PSR, Pankhurst countered at sentencing that there was no "benefit" (thus leaving the offense level at 10), asserting that, even without the $10,000 payment to Hooks, Pankhurst would have still acquired the loans/property for the $560,000 offered. Along that line, Pankhurst pointed out that, in fact, the RTC later accepted only $419,000 for the property, far less than the $560,000 Pankhurst had offered.

In the alternative, Pankhurst urged that, at most, the gain, not benefit, would have been what Atlas Oil (the actual offeror – owned by Pankhurst) might have realized later if it had both acquired the property and sold it; using the offer of $560,000 and the then-appraised value of $800,000, this sale would have resulted in a gain of $240,000. But, Pankhurst argued that, because neither event occurred, there was no "benefit" for guidelines purposes, again leaving the offense level at 10.

Having an offense level no greater than 10 was critical for Pankhurst. As noted *supra*, for a "first offender"

such as Pankhurst, and with that offense level, the sentencing court "may substitute probation for a prison term". U.S.S.G. Ch. 1 Pt. A 4(d) (1995).

After hearing extensive and detailed argument concerning the parties' vastly different positions as to the § 2C1.1(b)(2) "benefit", the court stated: "When I hear two intelligent lawyers as thoroughly familiar with the facts as you two, in this much disagreement, I just wonder if there is not a problem in the guidelines." (Emphasis added.) (The sentencing judge's comments were consistent with his views expressed three weeks earlier, at the originally-scheduled sentencing hearing; that hearing was continued because of Pankhurst's late receipt of the Government's response to his objections to the PSR. Prior to continuing that earlier hearing, the court heard similar argument by Pankhurst on why there was no "benefit"; the court indicated then that it was open on the issue.)

After further detailed argument, the court stated:

> We can stop right now on one point. I do not believe there was any actual gain. There was a possible remote potential [*355] gain, at least one level removed, that [Pankhurst] might have wound up with a corporation [Atlas Oil] with a piece of property that might be worth $800,000, that [Pankhurst] got for $560,000.

Following further argument over "benefit", vel non, the court stated:

> You both are absolutely right up to a certain point. I think this is a unique fact situation. I think what Mr. Pankhurst did was offer a bribe

> to do something that he could have done without a bribe. It was a, excuse the technical term, a dumb thing to do. And it constituted a violation of the law.
>
> What we are talking about now is what the appropriate punishment would be and whether the sentencing guidelines covers it. And I am slowly becoming convinced that because of the facts in this case, it is not something that I can find in the guidelines. I am having a real struggle with it.

(Emphasis added.)

Following yet further argument as to "benefit", and apparently taking hope in the court's twice-expressed concerns that the incident under consideration was not covered by the guidelines, Pankhurst urged, for the first time, a downward departure on that basis, claiming that the situation had "not [been] taken into consideration adequately" by the Guidelines. But, as the Government immediately pointed out, this departure-basis was totally different from the basis urged in Pankhurst's pre-hearing submission, discussed *supra*. As noted, and as the Government pointed out to the district court, Pankhurst had then claimed entitlement to a departure, but only on the basis that the Government had ruined his ability to do business. As the Government had discussed in its filed response to the earlier filed departure demand, the Government pointed out to the sentencing judge that Pankhurst based this entitlement claim on harm supposedly resulting from a press release about his conviction.

Following even more argument, the court ruled:

> All right. I have given this matter a great deal of thought. I have considered, with the probation officers, their various addenda and supplements.

And I believe that the probation officers are correct, and I adopt their report, that the base offense level is ten; that the potential benefit to Mr. Pankhurst through his ownership of the [Atlas Oil] stock was most likely the difference between $560,000 and $800,000.

I believe that $800,000 was the appraised value of the property at the time [Pankhurst] made the $560,000 offer, and therefore I believe that is the benefit [Pankhurst] intended to receive.

With his criminal history category of one, his guideline imprisonment range at that point would be 27 to 33 months.

His argument that he is entitled to a two level decrease for acceptance of responsibility is a close one. But I have never heard him admit that he offered the money to Mr. Hooks for the purpose of influencing Mr. Hooks to do something. Certainly he would not admit that he offered it as a bribe. Therefore I cannot give him acceptance of responsibility.

I am not impressed with the letter from the foreperson of the jury [discussed supra]. We will take that up if the matter arises.

But I do want to point out [that] page 7 of the latest version [1995] of the guidelines manual has this sentence in it[:] ["]The commission of course has not dealt with the

single acts of aberrant behavior that still may justify probation at higher levels through departures.["]

And what they are referring to is [U.S.S.G. § ] 5K2.0 and 18 [U.S.C. § ] 3553. And pursuant to those provisions, I find that there exists mitigating circumstances of a kind and a degree not adequately taken into consideration by the Sentencing Commission in formulating the guidelines, and therefore the sentence should be different from that provided in the guidelines. Specifically, the difference, the increase over the ten level.

I think the facts in this case are so peculiar and in such a strange state that the guidelines do not apply adequately in that increase. [*356] Therefore I am going to sentence him at level 10.

Pursuant to the resulting option given the court because of that low offense level to place Pankhurst on probation, rather than in prison, Pankhurst was given probation for one year, with a condition of home confinement. He was also fined $50,000. Later, the court remarked: "Mr. Pankhurst, because of the very peculiar facts of this case, I am giving you a break which the Government is going to be very upset about. I may have sentenced you both to [an appeal to the Fifth Circuit in] New Orleans."

The court had not put the parties on notice of this possible – and now just announced – basis for departure. But, unlike its objection earlier in the hearing, when Pankhurst seized on this basis for the first time, the Government did not object, after the sentencing-ruling, on the ground that the court was departing downward without giving Rule 32 pre-sentencing notice. Instead, at

this point (post-ruling), the Government objected only to the basis for the departure, and objected later to the court's not imposing sentence within the range recommended by the PSR.

The judgment, entered six days after the sentencing hearing, provided that the PSR was adopted, except that the court found a lower "benefit" ($240,000 instead of $5 million), resulting in an 8, instead of a 14, level increase. This resulted in a total offense level of 18, with a sentencing range of 27 to 33 months, as had been stated in the court's verbal sentencing-ruling. The following reason was then given for the downward departure, consistent with that given at sentencing and pursuant to 18 U.S.C. § 3553(b) and U.S.S.G. § 5K2.0: "The Court finds that the nature of the offense, representing a single, criminal act, is a mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission, pursuant to U.S.S.G. 5K2.0."

Before we can reach the merits of the basis for the departure, we must consider the Government's contention that it was denied the requisite Rule 32 notice of the court's intent to depart downward. It is undisputed that the court did not give such notice to the parties. And, prior to sentencing, the only departure-basis urged by Pankhurst was the claim that he was "entitled" to a downward departure because the Government had "ruin[ed] him financially". But, as noted, after the court alluded twice at sentencing to a possible basis for a § 5K2.0 departure, Pankhurst's counsel seized upon it:

I think that this is a proper case for a departure because the guidelines has not taken into consideration

adequately the circumstances of this case, and under the catchall provision of the guidelines and the Code, and I have cited that to Your Honor in the memorandum.

As also noted, the Government objected immediately:

> Judge, the government would object to a downward departure. [Pankhurst's counsel] specifically said that the basis for his downward departure was because the Government had basically ruined his client's ability to do business by sending an alleged press release to Dunn & Bradstreet.

In short, the Government objected promptly to the fact that the departure, alluded to by the court, was being requested by Pankhurst on a new ground for which the Government had not received pre-hearing notice. Restated, at that point in the hearing, the objection alerted the court, as well as Pankhurst, that the Government had not received notice of this new departure-basis, later used by the court. Such lack-of-notice, the Government contends, violates the rule enunciated in *United States v. Burns*, 501 U.S. 129, 115 L. Ed. 2d 123, 111 S. Ct. 2182 (1991).

1.

Prior to reaching this contention, we must decide whether the Government's objection, including combined with those post-ruling, is sufficient; that is, whether it presented/described adequately a lack-of-notice ground. Pankhurst urges that it did not; and that we should, therefore, review only for plain error. *See United States v. Hawkins*, 87 F.3d 722, 730 (5th Cir. 1996).

The objection to the basis seized by Pankhurst and ultimately used by the court certainly alerted the court that the sentencing hearing had moved to new territory for [*357] which the Government had not been given notice. As the court moved to this new territory off and on during the hearing, both before and after the Government objected to the new departure-basis when Pankhurst seized upon it, the Government should have better articulated its lack-of-notice objection, on the assumption that the sentencing court seemed inclined increasingly to use that basis.

But, surely, the court was aware when it ruled that it was utilizing a departure-basis sua sponte, without having given notice; and that, because of a lack of notice from both the court and Pankhurst, the Government had not had an opportunity to comment consistent with Rule 32. Part of the court's awareness had to come from the Government's earlier objection when Pankhurst urged this same – new – basis. On this record, the lack-of-notice objection was sufficient. See *United States v. Knight*, 76 F.3d 86, 87 (5th Cir. 1996). Accordingly, we turn to whether notice was required.

2.

Under Burns, Rule 32 requires that, before a district court may depart upward, the defendant must have notice, either in the PSR (*see* Rule 32(b)(4)(B)), or in a pre-hearing submission by the Government, or from the court. Our court so held prior to Burns. See *United States v. Otero*, 868 F.2d 1412, 1415 (5th Cir. 1989). However, our court has never expanded the holdings in Otero and

Burns to the situation at hand – the Government's not receiving notice of a possible downward departure.

Nevertheless, at least four other circuits have held that the rule applies to downward departures. See *United States v. Alba*, 933 F.2d 1117 (2d Cir. 1991); *United States v. Maddox*, 48 F.3d 791 (4th Cir. 1995); *United States v. Andruska*, 964 F.2d 640 (7th Cir. 1992); *United States v. Green*, 105 F.3d 1321 (9th Cir. 1997). Apparently, no circuit has held to the contrary. We join those circuits and hold that notice must be given to the Government before a district court may depart downward. This result is mandated by Rule 32, Burns, and Otero.

Rule 32 states that "the court must afford counsel for the defendant and for the Government an opportunity to comment on the probation officer's determinations and on other matters relating to the appropriate sentence. . . . " Fed. R. Crim. P. 32(c)(1). In other words, the Rule provides that the Government is due the same notice as is the defendant.

For this very reason, Burns noted that, for the issue in that case (pre-upward departure notice to a defendant), it would be equally appropriate to frame the issue as whether the parties are entitled to notice before the district court departs upward or downward from the Guidelines range. Under Rule 32, it is clear that the defendant and Government enjoy equal procedural entitlements.

*Burns*, 501 U.S. at 135 n.4 (emphasis added). Along these lines, Burns otherwise supports the application of its holding to the Government, as well as the defendant, for a downward departure.

Burns reasoned (as did *Otero*, 868 F.2d at 1415) that Rule 32 is intended to achieve focused adversarial development of the issues pertinent to a particular sentence. 501 U.S. at 135. Furthermore, the Rule explicitly gives the defendant the right to comment on a particular departure before it is imposed; Burns reasoned that, for this right to be meaningful, it must carry with it the right to notice of a possible departure. *Id.* at 136. As noted, the Government has the same comment-right; concomitantly, it must have the same notice-right.

The sentencing hearing for this case offers an excellent example of why such notice is required, as well as the benefit that will flow to the sentencing court as a result. The district court was troubled greatly by the facts at hand and extensively and most insightfully developed the question. Had the Government, and Pankhurst, been on notice of the new, possible departure-basis, they could have been of great assistance to the court through the resulting/subsequent legal research, briefing, and argument.

[*358] For example, as stated in the judgment, the court felt that "the nature of the offense, representing a single, criminal act, is a mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission, pursuant to U.S.S.G. 5K2.0." Had the parties been on notice, they could have better assisted the court in determining, as a further example, whether "the nature of the offense, representing a single criminal act" had been considered by the Sentencing Commission in imposing the § 2C1.1(a) base offense level of 10; the Government urges here that this base offense level does reflect such consideration.

As another possible aid to the court, the parties could have explored, or developed further, the introductory commentary to U.S.S.G. § 2C ("Offenses Involving Public Officials"):

> The Commission believes that pre-guidelines sentencing practice did not adequately reflect the seriousness of public corruption offenses. Therefore, these guidelines provide for sentences that are considerably higher than average pre-guidelines practice.

U.S.S.G. § 2 Pt. C Introductory Commentary.

As yet another example, the extensive commentary to § 2C1.1 might have provided further ground that could have been developed to assist the court. And, finally, counsel would have been far more able during the hearing to present and argue the other relevant portions of the guidelines and the case law.

Accordingly, due to the lack of notice, we must remand the case to the district court for resentencing, including giving the Government and Pankhurst notice and an opportunity to respond to, and otherwise comment on, the noticed possible ground(s) for departure.

III.

For the foregoing reasons, the conviction is AFFIRMED; the sentence is VACATED; and this case is REMANDED to the district court for resentencing, consistent with this opinion.

AFFIRMED in PART; VACATED and REMANDED in PART.

CONCUR BY: BENAVIDES.

CONCUR: BENAVIDES, Circuit Judge, specially concurring.

I concur in the judgment of the majority affirming appellant's conviction and remanding for resentencing.

Appellant contends that the district court abused its discretion by incorporating in its jury charge the original indictment. He argues that the indictment should have been redacted to omit any reference to the government's theory that he sought to influence a public official to commit a fraud upon the United States. As the majority correctly observes, the proof at trial focused on the government's other theory, i.e, that appellant sought to influence an official act. Compare 18 U.S.C. § 201(b)(1)(A) with *id.* § 201(b)(1)(B).

Because trial counsel did not object to use of the unredacted indictment, review is for plain error. Fed. R. Crim. P. 52(b). Even assuming that it was error to submit the original indictment to the jury, and that the error was "plain" in the sense of being "clear" or "obvious," appellant has demonstrated no effect on his substantial rights. Cf. *United States v. Calverley*, 37 F.3d 160, 162-64 (5th Cir. 1994). Accordingly, this first claim fails.

Appellant also argues that the district court erred in its jury charge by failing to define the "official act" which he allegedly attempted to influence. The court refused defense counsel's request to define the official act for the jury, instead referring the jury to the unredacted indictment. Appellant contends that this was confusing in that the jury may have concluded that the "official act" was

the unspecified and unproven "fraud" mentioned in the indictment.

Any confusion on this score was invited, if not manufactured, by defense counsel in his closing argument to the jury. Appellant complains that the jury charge regarding the "official act" was "ambiguous and confusing . . . in light of counsel's arguments;" yet it [*359] was defense counsel who described the "official act" as the "fraud" alleged in the indictment.[3] This circuit will not reverse on the basis of invited error, absent manifest injustice. *United States v. Sanchez*, 988 F.2d 1384, 1392 (5th Cir. 1993). There was no such injustice in this case. It is clear from the record evidence and the comments of the district court that the official act which appellant allegedly sought to influence was the RTC's sale of the note.[4]

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[3] Defense counsel argued to the jury:

> They charged that Joe Pankhurst with intent corruptly gave $10,000 to Ronnie Hooks with the intent to influence an official act. And here is the official act: To commit and aid in committing a fraud upon the United States, that is the acceptance of an offer by the defendant to purchase a loan being sold to the public by the Resolution Trust Corporation. . . . He wasn't trying to get to perpetuate a fraud. He was trying to do a reasonable business deal.

[4] As the district court explained to the jury at the beginning of the trial:

> Mr. Pankhurst is charged with giving a $10,000 payment to Mr. Hooks to influence Mr. Hooks to sell him the note. That's what the case, basically, is about.

Appellant's sufficiency claims are meritless. Accordingly, I would affirm appellant's conviction. However, I would vacate and remand his sentence for the reasons expressed by the majority. I therefore concur in the judgment.

# APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 96-20563

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UNITED STATES OF AMERICA

Plaintiff-Appellee-Cross-Appellant

v.

JOSEPH PANKHURST

Defendant-Appellant-Cross-Appellee

---

Appeal from the United States District Court for the Southern District of Texas, Houston

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**ON PETITION FOR REHEARING**

(Filed Aug. 20, 1997)

Before SMITH, BARKSDALE, and BENAVIDES, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is DENIED.

ENTERED FOR THE COURT:

/s/ Rhesa H. Barksdale
United States Circuit Judge

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# APPENDIX C

NO. 96-20563

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee/Cross-Appellant

v.

JOSEPH PANKHURST,

Defendant-Appellant/
Cross-Appellee

Appeal from the United States District Court
For the Southern District of Texas

# APPELLANT/CROSS-APPELLEE'S PETITION FOR REHEARING

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(On Appeal Only)

NO. 96-20563

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee/Cross-Appellant

v.

JOSEPH PANKHURST,

Defendant-Appellant/Cross-Appellee

Appeal from the United States District Court
For the Southern District of Texas

**APPELLANT/CROSS-APPELLEE'S PETITION FOR REHEARING**

TO THE HONORABLE COURT OF APPEALS:

JOSEPH PANKHURST, the Appellant/Cross-Appellee, brings this Petition for Rehearing in accordance with Fifth Circuit Rule 40.2, directed to this Court's Opinion of July 21, 1997, affirming the conviction, but vacating the sentence and remanding for re-sentencing. In support of this Petition for Rehearing the Appellant/Cross-Appellee would show the following error of law.

## Ground For Rehearing

**The Court of Appeals erred by applying different standards to the Defense and the Government when evaluating whether trial objections were sufficient to preserve issues for appeal.**

## Argument and Authorities

### I. Review of the Conviction

In the panel opinion, this Court stated that trial defense counsel did not properly preserve error by either making a specific objection to the proposed jury instruction on official act or by providing a requested instruction. It was stated that new counsel on appeal were raising an issue different from the one raised by trial defense counsel.

This Court stated, "In essence, what we are being presented with on appeal, in part, is appellate counsel's quite different view of the case from that of trial counsel. *It goes without saying that points raised at trial are the points that control on appeal." United States v. Pankhurst,* No. 96-2053, slip. op. at 13 (5th Cir. July 21, 1997) (emphasis added). Continuing, the panel stated, " . . . Pankhurst's appellate counsel have tried, in large part most improperly, to present a point of error where there was none. They have, for the most part, attempted to 'rewrite history.' They fail. The record is clear; what took place, took place." *Id.*

The challenge to the jury instructions was found to be without merit, as was the other error raised. The conviction was affirmed.

## II. Review of the Sentence

When the panel reviewed the Government's cross-appeal of the probated sentence, a completely different approach was taken to the Government's claim that the sentence should be vacated, in part, because of a lack of notice from the district court that it would depart downward.

The Government trial lawyer never objected to the sentence on the basis that no notice had been given that the district court was going to depart downward. The panel acknowledged this fact by stating, "But, unlike its objection earlier in the hearing, when Pankhurst seized on this basis for the first time, *the Government did not object, after the sentencing-ruling, on the ground that the court was departing downward without giving Rule 32 pre-sentencing notice.* Instead, at this point (post-ruling), *the Government objected only to the basis for the departure,* and objected later to the court's not imposing sentence within the range recommended by the PSR." *Id.* at 25-26 (emphasis added). Despite this, the panel then held, "On this record, the lack-of-notice objection was sufficient." *Id.* at 28.

The Appellant/Cross-Appellee challenged the preservation of this claimed error because there was no trial objection to lack of notice, asserting that nothing was presented for review, citing *United States v. Olano,* ___ U.S. ___, 113 S.Ct. 1770, 1776-77, 123 L.Ed. 2d 508 (1993); *United States v. Krout,* 66 F.3d 1420, 1434 (5th Cir. 1995), *cert. denied,* ___ U.S. ___, 116 S.Ct. 963, 133 L.Ed. 2d 884 (1996); and *United States v. Houston,* 892 F.2d 696, 707 (8th Cir.) 1989).

The Appellant/Cross-Appellee relies on the words this panel used in affirming the conviction and chastising the Appellant/Cross-Appellee's appellate counsel: "It goes without saying that points raised at trial are the points that control on appeal." *Id.* at 13. "The record is clear; what took place took place." *Id.*

Despite the Appellant/Cross-Appellee's correct contention in his brief on the sentencing issue that no lack of notice objection was made by the trial prosecutor, no mention was made and no citation to the record was given of any such objection by Government appellate counsel (who was a different lawyer from trial counsel) in the Reply Brief of Plaintiff-Appellee/Cross-Appellant, the last-filed appellate pleading. That pleading asserts only that the government trial counsel made the judge aware that he objected to the *basis* of the downward departure – there is no reply to the "lack of notice" issue. See Reply Brief of Plaintiff-Appellee/Cross-Appellant at pp. 8-9. Because there was no objection to the lack of notice, the trial judge had no opportunity to respond or to take corrective action, if appropriate.

While the Appellant/Cross-Appellee does not assert that the court erred in holding that both sides are entitled to notice of a trial court's intention to depart from the applicable sentencing guideline, appellate counsel for the Government was procedurally barred and cannot complain on appeal when the Government trial counsel did not properly preserve the issue at trial. *United States v. Morris*, 79 F.2d 409, 411 (5th Cir. 1996).

## Conclusion

The Appellant prays that this Honorable Court will withdraw its opinion of July 21, 1997, and issue a new opinion. If the Court is going to affirm the conviction, the sentence should also be affirmed. The same standard should be applied to appellate review of error preservation by trial counsel for the defendant and trial counsel for the prosecution.

Respectfully submitted,

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JOSEPH PANKHURST

## CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing Appellant/Cross-Appellee's Petition for Rehearing were mailed, certified mail, return receipt requested, to Ms. Alice Ann Burns, Assistant United

States Attorney, 910 Travis, Suite 1500, P.O. Box 61129, Houston, Texas 77208-1129 on the 4th day of August, 1997.

/s/ Jack B. Zimmermann

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# APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

THE UNITED STATES OF AMERICA

V.

JOSEPH PANKHURST

CR-H-93-277
May 31, 1996
Houston, Texas
9 a.m.

BEFORE THE HONORABLE NORMAN BLACK
UNITED STATES DISTRICT COURT
SENTENCING

APPEARANCES:

For the United States: Mr. Richard Smith, AUSA
Houston, Texas

For the Defendant: Mr. Dick DeGuerin
Houston, Texas

Proceedings recorded and transcript produced by computer-aided transcription.

[p. 2] THE COURT: All right. Now in 93-277, United States versus Joseph Pankhurst. Mr. Dick DeGuerin for the Government, Mr. Smith for the – I mean Mr. Smith for the Government, Mr. DeGuerin for the defendant.

MR. SMITH: Good morning, Your Honor.

MR. DEGUERIN: Good morning.

THE COURT: Well, here we are again. I assume you have gone over the report carefully with Mr. Pankhurst, Mr. DeGuerin. Is there anything you can tell me that will help your client in any way?

MR. DEGUERIN: I think so, Your Honor. If the Court please, the documents that should be before the Court – before we start on that, may I inquire whether the Court received correspondence from one of the jurors, Ms. Calvert?

THE COURT: Yes.

MR. DEGUERIN: May be have that?

THE COURT: Seems to me that came in some time ago.

MR. DEGUERIN: Yes, sir. May we have that –

THE COURT: I didn't bring the whole file with me. I just brought all of the pre-sentence report data.

MR. DEGUERIN: I am advised, Your Honor, that that may raise some issues of jury misconduct that have not been addressed by the Court. May we have leave of court to make the copy that Your Honor – the letter that Your Honor received part of the record, and leave of court for time to review that [p. 3] in order to determine whether it does raise an issue of jury misconduct?

THE COURT: Haven't you seen that letter?

MR. DEGUERIN: I was advised by Ms. Calvert that she did send a letter. But I don't – I did not know whether the Court had received it, Your Honor.

THE COURT: I don't remember – I know I got that letter, didn't I?

THE CLERK: Yes, sir.

THE COURT: You want to go check. Pull the file. It is right on my desk.

It would have been my practice to send you a copy. If I didn't do that, that is an oversight.

Did you get a copy, Mr. Smith?

MR. SMITH: No, Your Honor.

THE COURT: Then I didn't send anybody a copy, apparently. I assume that once you read that, if you want to address the matter in a post-trial motion, you can certainly do so.

MR. DEGUERIN: I am simply asking leave of court to do that, Judge.

THE COURT: Sure. Subject to the rules. I assume until you know about it, you can't very well take any action on it.

MR. DEGUERIN: Exactly. The time has passed for [p. 4] motion for new trial unless there is leave of court to file an out of time motion for new trial based on that, Your Honor.

I was advised by Ms. Calvert that – she called me and was very upset. I said that I am not supposed to contact you but you can clearly contact the Court, and if you want to send a letter to the Court, that is your prerogative.

And I understand – she told me that she did, but I never got the copy from Your Honor and so I didn't know whether she actually had or not.

THE COURT: I get so much correspondence. But I distinctly remember a letter in this case. I thought we had discussed it, frankly.

MR. DEGUERIN: She was the foreperson, as I recall.

THE COURT: We will get you both a copy. I am sure that would be an issue. I don't think that should be an issue here today.

MR. DEGUERIN: All right, sir.

THE COURT: I have got the manual in front of me. Give me some grounds to do something for your client

MR. DEGUERIN: Yes, sir. Well, the first, Judge, is in the increase from the base level, which the Government moves for and the probation PSI also says is warranted. And I need to address that.

THE COURT: All right.

MR. DEGUERIN: The increase from the base level of [p. 5] ten is based upon loss to the Government, either actual or potential, or gain to the defendant, either actual or potential.

It is the thrust of both my letter objections to the Probation Department and now my filed objections to the Court to the PSI that neither actual or potential loss to the Government or gain to the defendant is shown by the record.

And let me address that just step by step. It is clear from the evidence – and I have had a full transcript of the trial prepared and filed, and I have excerpted part of that before Your Honor – that before there was ever any mention of consultant fee, bribe – the government calls it a bribe, we call it a consultant fee – before there was ever any mention of that, there was an agreement in principal [sic] at least, between Mr. Pankhurst acting on behalf of Atlas Oil Company, the proposed purchaser of the indebtedness, and Mr. Hooks, acting on behalf of the RTC, that $560,000 was an agreeable price for the purchase of the indebtedness.

Now, the Government has contested that up until this morning. What I did was go back over the transcript and excerpt for Your Honor and included in the motion the actual testimony of Mr. Hooks on that point.

And it was very clear. Even though Mr. Hooks at one time apparently told the Government that he had said to Mr. Pankhurst that 560 would not be acceptable, that is simply [p. 6] not what the record shows.

What Mr. Hooks testified to before Your Honor was that the $560,000 figure came from him, Mr. Hooks. That was his suggestion on one side.

THE COURT: 70 percent of $800,000.

MR. DEGUERIN: That's right. Came from him on one side of the negotiating table, and was accepted by Mr. Pankhurst from the other side of the negotiating table, subject only to approval from Mr. Hooks' superiors. It was only after that point that the mention of the consultant fee bribe took place.

Now let's forget about that for a moment. An agreed buy and sell from two parties that were under no compulsion at the time the agreed buy and sell was made, is prima facie, probably the best evidence of the market value of the property.

Other evidence of the market value of the property was that Mr. Pankhurst for a year and a half had been telling the RTC that the loan was vastly overrated.

Along with that argument goes the fact that the person, the president of Texas Bank was then a fugitive from justice, having stolen millions of dollars from Texas Bank that had loaned that – the person that had made the note, in other words. There is plenty of evidence to believe that at some time before Mr. Pankhurst was ever involved, there was [p. 7] some hanky-panky going on between Texas Bank and JFTC.

MR. SMITH: I'm going to object at this point. There is nothing in the trial record, what Mr. DeGuerin is speaking about, and it is not relevant to his client's position in regards to what his client would have received had the bribery scheme been successful.

THE COURT: I will allow him. I'll allow him. Overruled.

MR. DEGUERIN: The point is that the loan that was outstanding, the face value of the loan, was far above the value of the underlying property.

To confirm this, the RTC hired their own appraisals and arrived at an $800,000 plus change value, present value. Also in the evidence is that the RTC was accepting

between 50 to 70 percent of the appraised value of property to negotiate away indebtedness for failed institutions.

What Mr. Pankhurst offered was at the top of what the RTC was accepting, and it was a figure that was suggested by the RTC.

Now what that shows is that what Mr. Pankhurst on behalf of Atlas Oil Company was negotiating to buy was a property that was worth what he was paying for. He wasn't getting some kind of extra value for what he was paying, nor was the Government losing money as a result of that [p. 8] transaction.

The Government did lose money as a result of the failure of Texas Bank Savings, as they did as a result of many of the bank failures that were going on. But later on, in Mr. Smith's latest filed, the Government's supplemental response, on Page 3 of that response, Paragraph 6, Mr. Smith says this,

Pankhurst alleges that the Government suffered no loss, actual or potential. Pankhurst's position is not correct. The loss to the Government on the Jetera loan is based on what the RTC must write off on the books and records of Texas Bank.

That is outrageous. What the RTC has to write off on the records of Texas Bank is a result of the failure of Texas Bank. It has nothing to do with Mr. Pankhurst or Atlas Oil or Jetera or anything except the failure of Texas Bank.

What Mr. Pankhurst offered and what the Government accepted in principal [sic], that is what the RTC

accepted in principal [sic], was a reasonable market value price for the indebtedness.

Now, one further evidence which is before the Court, wasn't before the jury, is that later, about a year later, little over a year later, the RTC accepted in an arm's length transaction 419,000 was it? 421,000, for the exact same property that Mr. Pankhurst tendered a cashier's check for $560,000.

[p. 9] That is evidence of market value. It is a year and a half later. You have to take that into account, and so forth, but is on – I would submit to the Court, it is a year in which values actually were increasing in Texas and around Houston. Not the time that Mr. Pankhurst – during the crash and before Mr. Pankhurst offered his money.

So what I am saying is what Mr. Pankhurst, on behalf of Atlas Oil Corporation – that is very important to keep in mind – offered was a reasonable value at market value of the property, that Atlas Oil would have gotten the indebtedness on.

Now, there is another more technical thing that the Court needs to consider. The way the transaction went was Atlas Oil Corporation had bought JFTC. JFTC was the obliger on the note to Texas Bank. Texas bank was the holder of the note for $5 million.

Neither JFTC nor Atlas Oil Corporation nor Mr. Pankhurst was personally liable on the note. So if the note defaulted, they couldn't come to Atlas Oil Corporation or to Mr. Pankhurst. The only resort that RTC would have had or the holder of the note would have had would be the underlying property.

THE COURT: There is no evidence of an assumption of the note.

MR. DEGUERIN: There was no assumption. No personal [p. 10] assumption of the note by either Atlas or Mr. Pankhurst.

Now, Atlas bought the stock of JFTC. It did not assume the indebtedness. Atlas is a viable corporation. There was never any effort by the government to pierce the corporate veil, so to speak.

Mr. Pankhurst is a stockholder and officer of Atlas Oil Corporation. Mr. Pankhurst – let's assume for a moment that Atlas would have realized some gain by purchasing at less that face value the indebtedness of JFTC.

Now it would not. Under corporate law, Atlas Oil Corporation's basis for the purchase of the $5 million note at $560,000, Atlas Oil Corporation's tax basis for that note is $560,000, the price of acquisition.

So Atlas Oil Corporation would not have had an income from buying that note that was the obligation of JFTC. Even if it had, if it had some taxable income from or benefit from purchasing that, that is not taxable income or benefit personally to Joseph Pankhurst, who is a shareholder and an officer of JFTC.

The only way that Mr. Pankhurst personally could benefit would be by the enhanced value of the stock of Atlas Oil Corporation. And that is a derivative benefit, at best.

Or by the declaration of a dividend, which at that time would be income. So there is no actual or potential

gain to Mr. Pankhurst personally. I think that is extremely [p. 11] important because –

THE COURT: The letter seems to have slipped through the system somewhere. We will find it if it exists.

Go ahead.

MR. DEGUERIN: – Because there is no personal benefit to Mr. Pankhurst, there is no potential personal benefit, other that perhaps an increase in the value of his stock in Atlas Oil Corporation.

But that benefit at best would be measured by when and if Atlas Oil Corporation sold the underlying property that was the result of – that they acquired. And then you measure the benefit to Atlas Oil Corporation by their tax basis, subtracted from the sales price.

If the sales price, for instance, was $800,000, then their gain at the time of sale of the property would be 560 less – or 800,000 less 560, or roughly 240,000. But that didn't happen. So there is no actual benefit.

We can look at the sale for 421,000 as evidence that – we can look at the later sale as evidence that if Atlas had sold the property, that it would have suffered a loss, the difference between its acquisition price, 560,000, and the sales price later of 421,000.

So the point is there should be no increase in the basic ten point level as a result of benefit to Pankhurst, the defendant, or loss to the Government. The Government [p. 12] suffered no loss. Mr. Pankhurst had no gain, actual or potential.

THE COURT: Stop at that point.

MR. DEGUERIN: Yes, sir.

THE COURT: Mr. DeGuerin has told us, Mr. Smith, everything except why Mr. Pankhurst would offer consideration to do something that is of no benefit to him. What is your response to his argument that there was no benefit?

MR. SMITH: Judge, there was a benefit to Mr. Pankhurst. And what we need to do, Judge, is to focus our attention on what Mr. Pankhurst was attempting to do versus the value, fair market value of the property.

The fair market value is not relevant for this Court's consideration for these reasons. Under the sentencing guidelines, we can look at the benefit he received or the intended benefit he would have received.

In this particular case, the defendant was not trying to purchase the land, so the fair market value of the land was of no relevance. He already owned and controlled the lands because he was the sole shareholder officer for JFTC and to the best of my knowledge the sole shareholder officer of Atlas Oil.

The problem Mr. Pankhurst had was that JFTC, according to his own words, was about to default on a note that he had just bought. The company was legally obligated to [p. 13] pay whoever held those notes, whatever the face value of those notes were. In this particular case, the face value of the notes would be $5.6 million.

I would direct the Court's attention to U.S. v. Landers – I only have one copy so I will pass this up to you, Your Honor – where the Court talks about how you determine the benefit to be received by the defendant.

And it says, in determining the proper sentence for enhancement, the defendant convicted under – in this case it was commercial bribery, but they make an analogy to 2C1.1 – the value of the proper benefit conferred to the defendant bribe is measured by deducting the direct cost from what he pays.

What this case is saying, Judge, what you look at, the notes in this case face value were $5.6 million. This Court should deduct the $560,000 he offered, from the face value of the notes, to determine what benefit he would have received in this case.

Because if he did not control his notes, any other third party could have come in and purchased those notes from the RTC, and there is evidence in the record that Tepco was an interested third party who offered $800,000 for those notes, would have had the ability of foreclosing and forcing Mr. Pankhurst to sell the assets to satisfy their note if it was a nonperforming note. [p. 14]

In that case, if that had occurred, whatever the difference between what Mr. Pankhurst settled with the third party for and the value of the notes, that third party, under IRS rules, would have been required to give him a 1099 for a forgiveness of debt.

So, for example, if Mr. Pankhurst had been able to buy the notes legitimately for $560,000, and if Atlas Oil had foreclosed on those notes, and if JFTC could only pay $1 million, JFTC would have gotten a 1099 from Atlas Oil in the amount of $4.6 million as a forgiveness of debt, which would have been a taxable event had Mr. Pankhurst or some other third party bought the notes and acted on them.

And when you look at the fair market value – the Government would refer the Court to U.S. versus Henderson. And in that case, the Fifth Circuit gives examples of when, how you look at the fair market value. And that case cited U.S. versus Wimbish, which is 980 F2d. 312, Fifth Circuit, where they held that the face value of the stolen forged checks was the proper value used to determine intended loss.

Although no one actually executed the checks and you never had the loss, that was the fair value the Court was using in that case and was found to be appropriate.

That case also cited U.S. versus Brown, which is another Fifth Circuit case found at 7 F3d. 1155 at Page 1159, holding that the full value of the stolen money orders [p. 15] constitute the loss because the defendant clearly intended to inflict that harm.

In this particular case, it is quite clear Mr. Pankhurst had no intent to pay off the Notes of JFTC. The notes that the company lien was obligated to pay back to the RTC and that he became responsible for when he became the sole shareholder, chief executive officer of that particular company.

What his intent, it is clear from the evidence in this case, was to buy – eventually pay 10 cents on the dollar to avoid having to pay off the notes, so the intended benefit to him would have been, one, JFTC would have never had to pay off the balance of that loan; two, as long as he controlled the indebtedness, there would never be a taxable event because Atlas Oil would never foreclose, therefore you don't get a 1099, therefore he didn't face any other tax liabilities; and three, we know he was dealing

with Tepco because he sent them the appraisal for $5.6 million.

He was attempting to sell either part of JFTC to a third party, or the land to another company called Preco. So he would have been in position to control the tax consequences by not having a 1099 issued, and in a position to sell it to two third parties, the land to Preco, which the company wanted to buy the six tracts of land adjacent to his company, and then sell the refinery over to Tepco to be used [p. 16] as an oil pumping facility.

So those are direct benefits he would have received in this case. And for us to say, well, let's look at the fair market value of the property, that is not relevant because in this case, regardless whoever owned the notes, they could come after him for 5.6 million.

Maybe JFTC couldn't pay 5.6 million, the land may have had a negative value, but legally they are still obligated to pay 5.6 million. So whatever price they settle on, if they sell it for $1 million, they still have the benefit of the forgiveness of debt issue.

And then the part about the loss to the Government, when the Government assumed these notes from Texas Bank, if he had paid these notes off, there would be no loss because the Government would have recouped 5.6 million so the taxpayers don't have to eat 5.6 million.

It was because of his actions of paying a bribe to try to get his notes which prevented the Government from being able to recoup a tax benefit on these notes or recoup the entire amount of the notes from the money that was borrowed.

THE COURT: When I hear two intelligent lawyers as thoroughly familiar with the facts as you two, in this much disagreement, I just wonder if there is not a problem in the guidelines.

[p. 17] MR. DEGUERIN: Well, there is a definitely [sic] a problem in the guidelines. They ought to be abolished.

But let me respond briefly to what he said, just point by point, Judge. First, as to attempt to sell to Tepco, that flies in the face of the evidence.

What Mr. Pankhurst testified about, what the evidence showed in this case, was Tepco made an inquiry. Mr. Pankhurst had no interest in selling the property to Tepco.

What he did was send to Tepco the same appraisals that he had received when he bought the property, the old appraisals that had been used apparently by JFTC quite some time ago to defraud Texas Bank. He sent them those.

He wasn't interested in – he didn't attempt to sell the property to Tepco as the Government says here. In fact, he had no interest in doing it at all.

What he was trying to do was make a going concern of JFTC. That was his interest. What he had at stake was a mere $2,500, $2,500 that the evidence shows is what he paid or Atlas paid for the stock of JFTC.

Another point. Mr. Smith says that if the note were foreclosed, the Government would come after Mr. Pankhurst to pay off the note. That is not true. It just couldn't happen.

Mr. Pankhurst – neither Mr. Pankhurst nor Atlas were obligated on the note. What the Government, standing in [p. 18] the shoes of Texas Bank, would be relegated to, if they foreclosed, which they did not want to do and refused to do throughout the history of this case, what they would be relegated to is –

THE COURT: Sue the maker.

MR. DEGUERIN: – Sue the maker, which was JFTC. And there is no personal obligation there, and so they would be able to foreclose and take the property.

THE COURT: And Mr. Pankhurst would have been out $2,500.

MR. DEGUERIN: $2,500.

THE COURT: I understand.

MR. DEGUERIN: Now – and as he said, but what he would prefer to do would be to build this company into a going concern, which he was about the work of doing. In fact, for the first few months that Atlas owned JFTC, they continued to make the payments as they were due on the note. But he wrote – and the evidence is in the record – he wrote to the RTC trying to get a response. This is overvalued. We can't continue to do this. The income simply won't justify it.

THE COURT: I was there.

MR. DEGUERIN: And what response did he get? We can't talk to you as long as the note is current. So he does what they say, he quits paying. I mean it is just – it is almost like the Keystone cops. And the only –

[p. 19] THE COURT: It also shook up the FDIC that they were making payments. They weren't used to that.

MR. DEGUERIN: That is correct.

So we get down to gain or loss. Motivation. His motivation was to make JFTC a going concern and to –

THE COURT: By buying a piece of property that he thought was worth about $800,000 for $560,000. Okay.

MR. SMITH: Judge –

MR. DEGUERIN: Maybe it was worth 800. That is what the Government's appraisal said. It certainly wasn't worth five million. And it may have been worth only 421,000, which is what the Government sold it for.

THE COURT: No.

MR. SMITH: Judge, may I –

I'm sorry, Mr. DeGuerin.

MR. DEGUERIN: The point is that there should be no – there was no actual gain and there was no actual loss to the Government.

Potential gain, there was no potential gain to Mr. Pankhurst personally because, for one thing, it was a negotiated price and it was worth what he agreed to pay for it, what they agreed to sell it for. That is the best measure of market value.

THE COURT: We can stop right now on one point. I do not believe there was any actual gain. There

was a possible [p. 20] remote potential gain, at least one level removed, that he might have wound up with a corporation with a piece of property that might be worth $800,000, that he got for $560,000.

MR. DEGUERIN: Yes. That's correct.

MR. SMITH: Judge, can the Government respond?

THE COURT: Save your breath, Mr. Smith, on that point.

MR. SMITH: Just one point.

THE COURT: Go ahead.

MR. SMITH: Basically this fact scenario in our case is analogous to a fact scenario in U.S. versus Falcioni. In that case a third party approached IRS to try to extinguish a tax liability that somebody else owed.

The tax liability was $41,000. The principal that owed the money gave the interceder, the third party, $10,000 to get that taken care of. He actually paid $3,500 to the IRS in the form of a bribe for it to go away.

And basically their argument in that case from the defense was there was no intended loss to the Government and no benefit to me because I only paid them $3,500, so you cannot assess me the full $41,000 owed by the original taxpayer.

According to – this case said the loss to the Government would have been the $41,000 it would have been [p. 21] legally obligated to collect. Even if it was just a piece of paper that they would have never enforced, still the

original party would have been on the hook for $41,000, and now the Government didn't have that possibility. And I want to cite that case. It is U.S. versus Falcioni, 45 F3d. 24.

In this case, JFTC, whether it became a going concern or not, was still legally obligated to whoever held those –

THE COURT: I don't know where you get that.

MR. SMITH: Because, Judge, the notes were collateralized –

THE COURT: You mean because they were the maker of the note?

MR. SMITH: They were the – that corporation was the maker of the notes. And it was legally obligated to repay those notes.

THE COURT: It was legally obligated to repay – okay.

MR. SMITH: Once Mr. Pankhurst assumed all the stock in that corporation –

THE COURT: But he didn't assume the liablilties. He bought the stock.

MR. SMITH: Judge, the liabilities come with the capital. You can't separate.

THE COURT: Oh, sure you can.

MR. SMITH: Judge, you can't do anything with the [p. 22] corporation until that liability is resolved. If he is going to make JFTC an ongoing concern, he has got to extinguish the debt.

THE COURT: Unless you pierce the corporate veil, the stockholders are not responsible for the debts of the corporation.

MR. SMITH: But he can't sell the corporation, he can't make any money off the corporation until that –

THE COURT: That is true. He could give it away. He could walk away from it. He could burn that stock.

MR. SMITH: So his motivation for being able to make it a thriving concern was to pay the bribe, to pay back the $560,000 so he would be able to move the corporation.

THE COURT: You both are absolutely right up to a certain point. I think this is a unique fact situation. I think what Mr. Pankhurst did was offer a bribe to do something that he could have done without a bribe. It was a, excuse the technical term, a dumb thing to do. And it constituted a violation of the law.

What we are talking about now is what the appropriate punishment would be and whether the sentencing guidelines covers it. And I am slowly becoming convinced that because of the facts in this case, it is not something that I can find in the guidelines. I am having a real struggle with it.

[p. 23] MR. SMITH: Judge, I think the application –

THE COURT: Anything else you-all would like to tell me?

MR. DEGUERIN: No, sir. Just one little quibble that, it may be a distinction without a difference, and that is that I agree with Your Honor that the bribe wasn't necessary, that it would – that Mr. Pankhurst would have been able to buy the property at the $560,000 without the bribe.

THE COURT: Probably. Probably.

MR. DEGUERIN: Yeah. It was a –

THE COURT: Provided he could get someone at the FDIC to listen to him, other that Mr. Hooks.

MR. DEGUERIN: If someone would just pick up the phone.

THE COURT: And Mr. Hooks had no authority except to talk to him.

MR. DEGUERIN: He had the authority to negotiate and to pass on the negotiations, and since the price was one that he suggested and Mr. Pankhurst accepted, it probably would have been accepted. That is the way the testimony went.

MR. SMITH: Well, Judge, the evidence is –

THE COURT: Maybe he expedited or intended to expedite, to speed it up.

MR. SMITH: But, Judge, the evidence in this case was that the offer was not accepted. Because if you look at the [p. 24] first transcript, tape-recorded conversations –

THE COURT: No question about it.

MR. SMITH: Hooks never accepted the first.

THE COURT: I don't think Mr. Hooks did one single thing wrong.

MR. SMITH: And he never indicated to Mr. Pankhurst that your 560 – the officers – it is acceptable to us. He basically said, will you increase it to 560, and was going to pass it on. But no one ever indicated to Mr. Pankhurst that 560 was a done deal. Because if they had done that, Judge, it would have been no basis to pay a consultant fee.

THE COURT: He wanted to make the deal and he wanted Mr. Hooks to get in there and promote it for him and sell it for him and convince them to take it and do it proper.

Besides, I don't know where the $560,000 came from, but I suspect he could have found a better use for that money than having it sit with the FDIC for months and months and months, waiting for them to accept or reject his offer.

MR. DEGUERIN: There was testimony as to where it came from. It came from several different sources that he borrowed it from, Judge. And he got the money back and paid the money back, although he had to – he lost considerable.

THE COURT: Even if it came out of his sock, he lost the use of that money if the FDIC didn't give him the notes for $560,000.

[p. 25] MR. DEGUERIN: That is correct.

THE COURT: What else?

MR. DEGUERIN: Judge, that is it. I have submitted to Your Honor, I think that this is a proper case for a departure because the guidelines has not taken into consideration adequately the circumstances of this case, and under the catchall provision of the guidelines and the Code, and I have cited that to Your Honor in the memorandum.

MR. SMITH: Judge, the government would object to a downward departure. He specifically said that the basis for his downward departure was because the Government had basically intentionally ruined his client's ability to do business by sending an alleged press release to Dunn & Bradstreet.

That is not correct. That never happened. What happened in this case, like we do in every other criminal case, one there is a conviction, that is public record. We sent out a general press license, and Dunn & Bradstreet put it on the wire.

THE COURT: That Dunn & Bradstreet thing doesn't affect me one way or the other.

MR. DEGUERIN: In the calculation, Judge, if there is no increase, then the base offense level is ten.

On acceptance of responsibility, I concede that –

[p. 26] THE COURT: He didn't accept responsibility.

MR. DEGUERIN: Let me say this. I concede that he is not entitled to three points, because the third point comes when a trial is avoided by reason of early acceptance.

What he did was accept factual responsibility. He never denied making the two $10,000 payments. And what the guidelines provide for is acceptance of factual responsibility. And the guidelines do not punish a defendant who contests legal issues, the legal issue here being entrapment.

MR. SMITH: Judge, he never – that is one of the critical elements, that we cannot establish his mens rea, his intent to commit the bribe, there is no offense. And this man has never admitted that he intended to bribe Mr. Hooks.

His position has been this is a legitimate consultant fee, legitimate business transaction, i.e. there is no basis for a conviction.

MR. DEGUERIN: Should the Court accept the proffered acceptance of factual responsibility that Mr. Pankhurst, in his testimony as well as today and in his statements that he wants to make to the Court now, accepts factual responsibility, which is what is required by the guidelines for the two point downward adjustment in the offense level, that would make the 10 point base offense level reduced to 8 point base offense level, and make the guideline range from 0 [p. 27] to six months.

THE COURT: I understand. I want to get all of the lawyers' arguments out of the way before I hear from Mr. Pankhurst. Is there anything further?

MR. DEGUERIN: No, sir.

THE COURT: Mr. Smith.

MR. SMITH: It is the Government's position there has been no acceptance of responsibility in this case

as required under the guidelines. There has been no remorsefulness on his part. There has been nothing to show that, yes, I made wrong – forgive me for my transgressions.

In this case he has maintained the same position is that he has done no wrong. And it would be inappropriate to give him any downward departure whatsoever in terms of acceptance of responsibility.

THE COURT: I am not at all surprised that that is the Government's position.

Mr. Pankhurst.

THE DEFENDANT: Your Honor, standing here listening to the lawyers haggle over my life, listening to this Court argue with the legal issues in this matter, I agree with you. It was a dumb thing to do.

I have been in hundreds of negotiations, been in business all my life, negotiated with heads of state in different foreign countries. Never been accused of anything [p. 28] unethical or wrongdoing.

There was a meeting of minds, in my opinion, at the point in time when I negotiated this deal with Mr. Hooks. All of a sudden I am the bad guy. We have corporate that I was acting on behalf of the corporation, and always have and always will. I understand the distinction between a stockholder and a corporation. But I got convicted.

And I just read this letter from the forelady, Lynette Sheehan Calvert, who says, Mr. – and I quote, Mr. Pankhurst had money. He must have walked into the Resolution Trust Corporation's office and bribed Mr. Ronnie Hooks to repurchase his notes.

The jury thought that I was repurchasing my notes, and on that basis, led them to a guilty verdict. But that is not true. I did not repurchase my notes, as the evidence would show.

And I don't want to plead this and rehash this because Your Honor is aware of it. But I do emphatically accept responsibility for paying Mr. Hooks the two $5,000, and I accept responsibility in full for the testimony that I gave in this trial, truthfully.

I have nothing further to say.

THE COURT: All right. I have given this matter a great deal of thought. I have considered, with the probation officers, their various addenda and supplements.

[p. 29] And I believe that the probation officers are correct, and I adopt their report, that the base offense level is ten; that the potential benefit to Mr. Pankhurst through his ownership of the stock was most likely the difference between $560,000 and $800,000.

I believe that $800,000 was the appraised value of the property at the time he made the $560,000 offer, and therefore I believe that is the benefit he intended to receive.

With his criminal history category of one, his guideline imprisonment range at that point would be 27 to 33 months.

His argument that he is entitled to a two level decrease for acceptance of responsibility is a close one. But I have never heard him admit that he offered the money to Mr. Hooks for the purpose of influencing Mr. Hooks to do something. Certainly he would not admit that he offered it as a bribe. Therefore I cannot give him acceptance of responsibility.

I am not impressed with the letter from the foreperson of the jury. We will ta[illegible] that up if the matter arises.

But I do want to point out, at Page 7 of the latest version of the guidelines manual has this sentence in it. The Commission of course has not dealt with the single [p. 30] acts of aberrant behavior that still may justify probation at higher levels through departures.

And what they are referring to is 5K.2.0 and 18 United States Code, Section 3553. And pursuant to those provisions, I find that there exists mitigating circumstances of a kind and a degree not adequately taken into consideration by the Sentencing Commission in formulating the guidelines, and therefore the sentence should be different from that provided in the guidelines. Specifically, the difference, the increase over the ten level.

I think the facts in this case are so peculiar and in such a strange state that the guidelines do not apply adequately in that increase. Therefore I am going to sentence him at the level 10.

It is the sentence of the Court that Mr. Joseph Pankhurst be placed on home confinement for one year and fined $50,000, and pay a special assessment of $50 per count. At this stage I have lost track of how many counts we were dealing with.

MR. SMITH: One Count, Your Honor. It is a one-count indictment.

THE COURT: One Count. Then he will pay special assessment of $50. The fine and the $50 assessment will be due and payable immediately. Should the probation officer advise the Court that the fine cannot be paid immediately, the [p. 31] Court will create a payment schedule.

Is there anything further I need to cover, Mr. Osborne?

MR. OSBORNE: Yes, Your Honor. The home detention needs to be as a condition of probation. There needs to be a probationary term imposed.

THE COURT: The probation period is one year, and the condition of probation is home confinement pursuant to our usual terms.

MR. OSBORNE: Yes, Your Honor.

THE COURT: Will that cover it?

MR. OSBORNE: It should, Your Honor.

THE COURT: All right.

MR. DEGUERIN: Your Honor, does that –

MR. SMITH: The government needs to object on the record to the sentence that has been imposed. I just

want to state for the record, we disagree with the Court's basis for downward departure and reserve the right and will be filing a notice of appeal.

THE COURT: Be advised, Mr. Pankhurst – and Mr. DeGuerin can go over this for you – you have a right to appeal your conviction and the sentence under certain circumstances.

The notice of appeal must be filed with the district clerk within ten days after the entry of judgment of conviction. The clerk can prepare the notice for you. Here [p. 32] is a form which tells you your appellate rights.

MR. DEGUERIN: May I ask for a clarification of the home confinement, Your Honor? Mr. Pankhurst has asked me to ask for a clarification as to whether that will allow him to go to his office to work.

THE COURT: Of course. He will be able to go to his office. He will be able to go about his ordinary business affairs. He will be under certain restrictions as to where he can go and when he can go, and he will be monitored by the probation office.

He will of course go to business travel. I'll permit business travel, as long as it is legitimate business travel. And we have a pretty standard way of providing for that and it will all be explained to him.

Mr. Pankhurst, because of the very peculiar facts of this case, I am giving you a break which the Government is going to be very upset about. I may have sentenced you both to New Orleans.

MR. SMITH: Just for the record, the Government objects to the sentence that is being imposed. The

government thinks the pre-sentence report correctly reflected the sentence range, the correct sentence for defendant, which would have been – I believe it is 58 to 63 months, and we object to the Court not applying the 16-level increase as stated in the pre-sentence report.

[p. 33] THE COURT: All right.

MR. SMITH: One other matter, Your Honor. Mr. Pankhurst –

THE COURT: That is noted.

MR. SMITH: – is a Canadian national and he has a passport, and I would ask that that be surrendered to the clerk's office until such time as –

THE COURT: Do we have his passport?

MR. DEGUERIN: I don't think so.

MR. SMITH: That it be surrendered until such time as he completes his probated sentence as imposed by the Court.

MR. DEGUERIN: No. It has not been. He has had no travel restrictions on his bond at this point.

THE COURT: He will be able to travel for business purposes as long as the probation office allows it.

All right. We will stand in recess.

MR. SMITH: Thank you, Your Honor.

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[p. 34] UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

I, June Simon, Official Court Reporter, United States District Court, Southern District of Texas, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that I reported the proceedings had in the above-styled and numbered cause on 5-31-96; that a transcript of said proceedings was later reduced to typewriting by me or under my personal supervision, and the above and foregoing 33 pages constitute a true and correct transcript thereof.

Given Under My Official Hand, this the 16th day of June, 1996.

/s/ June Simon
June Simon

Official Court Reporter